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No. 80-2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

FRANKLIN D. SMITH,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions below, all of which are unreported, are reproduced in the Appendix to the Petition as follows: District Court's findings of fact, conclusions of law, and order of dismissal (A. 10-16); District Court's order denying Petitioner's new trial motion (A. 17-20); *per curiam* opinion of the Court of Appeals for the Fifth Circuit affirming District Court's decision (A. 1-4); *per curiam* opinion of the Court of Appeals for the Fifth Circuit denying Petitioner's petition for rehearing and suggestion for rehearing *en banc* (A. 5-9).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Petitioner's mere proof of his minority status and the bare facts of his discharge from employment established a prima facie case of employment discrimination under Title VII of the Civil Rights Act of 1964.

STATUTE INVOLVED

The pertinent provisions of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2(a)(1)-(2)) are set forth in the Petition at pp. 2-3.

STATEMENT OF THE CASE

Except as noted below, the Petitioner's Statement of the Case is essentially correct. Petitioner, however, either omits or misstates the following relevant facts.

When Petitioner's counsel concluded his cross-examination of his sole witness, an employee of Respondent, and rested his case, counsel for Chrysler Corporation moved for an involuntary dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on the ground that the Petitioner had not established a prima facie case of employment discrimination. (A. 11). After hearing the argument of counsel for both parties respecting Chrysler's motion for involuntary dismissal, the District Court announced its intention to grant Chrysler's motion. The District Court, however, advised the Petitioner's counsel that it would allow the Petitioner to reopen his case and present additional evidence toward the establishment of a prima facie case of employment discrimination. The District Court

briefly recessed the trial to afford Petitioner's counsel the opportunity to consider reopening the Petitioner's case for the presentation of additional evidence. Following a brief recess the Petitioner's counsel declined to reopen the Petitioner's case and the District Court granted Chrysler's motion for involuntary dismissal. (A. 11-12).

In its order of dismissal the District Court found only the following facts. The Petitioner belongs to a racial minority. The Petitioner was discharged from his employment. The Petitioner was not discharged on the basis of his job performance. (A. 12).

In dismissing the Petitioner's case for failure to establish a prima facie case of employment discrimination the District Court also noted what the Petitioner's evidence did *not* show.

> "Though the employment vacancy created by the plaintiff's discharge was subsequently filled, the plaintiff introduced no evidence indicating that he reapplied for employment or indicating the race of the person hired to fill the job vacancy opened by the plaintiff's discharge. The plaintiff introduced no evidence whatsoever supporting his contention in paragraph 5 of his complaint that he had 'routinely been assigned only the more difficult chores by supervisory personnel, who were of a different race.' The plaintiff introduced no evidence indicating or suggesting any disparate treatment of minority and non-minority employees in the assignment of work at Chrysler's parts depot. Finally, with respect to the reason advanced by Chrysler for the plaintiff's discharge—*i.e.*, the plaintiff's insubordinate and threatening conduct—the plaintiff offered no evidence suggesting that non-minority employees had been treated any differently than minority employees with respect to such conduct."

(A. 12-13).

Contrary to the Petitioner's suggestion that the "thrust" of the opinions below is that the "plaintiff in a Title VII case in order to prove a 'disparate treatment' prima facie case, needed to prove, as a part of that case, the race of the person ultimately hired for the position for which he was rejected" (Petition 5), it is clear from a reading of the opinions below that dismissal was not predicated solely on the lack of such evidence. The other reasons for the District Court's dismissal, including the District Court's findings of fact and conclusions of law, are set forth in the District Court's original order of dismissal. (A. 12-16). Finally, the Petitioner's statement that reinstatement efforts proved fruitless (Petition 4) is completely unsupported by any trial testimony, exhibits, or findings of fact by the District Court.

SUMMARY OF ARGUMENT

The issue in this case is uniquely factual. The Petitioner's cause warrants neither review by this Court nor a restatement of those elements necessary to establish a prima facie case of racial discrimination.

In essence, the Petitioner rested his case after having proven *only* his minority status and the bare fact of his discharge. Indeed, the Petitioner never even took the witness stand. The reason advanced by Chrysler in its Answer for discharging the Plaintiff—*i.e.,* his insubordinate and threatening conduct toward supervisors—was never challenged. (A. 13). The Petitioner did not contend or suggest that non-minority employees guilty of similar conduct had not been discharged. (*Id.*) Likewise, the Petitioner offered no evidence whatsoever of any disparate treatment of minorities and non-minorities, either in the assignment of work orders or in the discharge of employees for insubordinate and threatening conduct toward supervisors. (A. 14-15).

The firing of a minority employee, whose job performance (as distinguished from his on-the-job conduct) is otherwise satisfactory, does not automatically raise any inference of racial discrimination. Title VII does not forbid the discharge of minority employees for misconduct when the discharge is wholly unrelated to the employee's race or his otherwise satisfactory performance of his assigned tasks. Until a plaintiff offers at least some evidence suggesting that the employer's reason for discharge has a disparate impact upon minorities or has been applied differently as between minority and non-minority employees, no inference of racial discrimination arises. In the case at bar, the Petitioner failed to establish a prima facie case because his evidence failed to suggest in any way that Chrysler treated the Petitioner or any other minority employees any differently than it treated non-minority employees in the same facility. The lack of such evidence warrants denial of the Petition without review by this Court.

ARGUMENT

A Plaintiff's Mere Proof Of His Minority Status And The Bare Fact Of His Discharge From Employment Does Not Establish A Prima Facie Case Of Employment Discrimination Under Title VII.

In arguing what he deems to be the issue before the Court, the Petitioner complains that the United States Court of Appeals for the Fifth Circuit "has placed an unwarranted burden on plaintiffs in employment discrimination cases who proceed on what is known as the 'disparate treatment' theory." (Petition 6). The Petitioner goes on to complain that the Fifth Circuit has altered the prima facie case elements enunciated by this Court in *McDonnell Douglas Corp.* v. *Green* (Petition 9-10). Arguing that the Fifth Circuit requires a greater quantum of proof than that required under this Court's *McDonnell Douglas* standard (Petition 9), the Petitioner goes on to recite what the fourth *McDonnell Douglas* element really is. (Petition 10).

Under Petitioner's own argument, he was required to prove at trial "that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications" (Petition 10). The very findings of fact by the District Court, however, disclosed that the Petitioner failed to carry his evidentary burden even on this element. In examining his sole witness, Chrysler's depot manager called on cross-examination, the Petitioner never even asked how long his former job remained open and whether Chrysler had continued to seek applicants for the position. Indeed, Petitioner's cross-examination elicited only the fact that Petitioner's former job had indeed been *filled.* Given this fact, the fourth element enunciated by this Court in *McDonnell Douglas,* a refusal-to-hire case, became moot. Instead, the logical question, if Petitioner hoped to show any disparate treatment whatsoever, was whether Chrysler Corporation had filled Petitioner's former job with a non-minority applicant. Had the question been asked

and answered in the affirmative, the Petitioner's counsel might arguably have created some inference of discrimination. That question, however, was never asked despite the District Court's invitation to the Petitioner to reopen his case.

Petitioner contends that he is proceeding under a "disparate treatment" theory (Petition 6), and cites in support of his argument the Tenth Circuit's observation that a *McDonnell Douglas* prima facie showing "is simply proof of actions by an employer from which discriminatory animus may be inferred." (Petition 12). But where in the scant evidence adduced by the Petitioner at trial is there any evidence whatsoever from which the District Court and Fifth Circuit might have inferred any discriminatory animus or disparate treatment as between minority and non-minority employees? Instead of demonstrating such evidence to the Court, which Petitioner most assuredly cannot do, Petitioner sidesteps the evidentary insufficiency of his prima facie case and resorts to what he calls a "rather basic presumption."

> "[W]hen an employer takes an action adverse to a competent minority employee, we can presume a discriminatory motive unless the employer truthfully articulates a non-discriminatory reason."

(Petition 13).

The Petitioner's "basic presumption" merely begs the question. Under the Petitioner's "basic presumption", the discharge of every competent minority employee would be presumptively discriminatory merely by virtue of the employee's race. Surely the Petitioner does not mean to suggest that minority employees can do no wrong; that minority employees, notwithstanding the adequacy of their job performance (as opposed to their on-the-job conduct), should not be fired for the same misconduct for which non-minority employees are fired.

In point of fact, the Petitioner's "basic presumption" is little more than a presumption of guilt on the part of the employer. Indeed, what the Petitioner is suggesting is that an employer be compelled to justify his behavior at trial *before* a plaintiff has raised any inference of discrimination. But until the minority plaintiff offers at least some evidence suggesting that he has been accorded treatment different from that accorded non-minority employees the employer should be under no more obligation to explain the discharge of a minority employee than to explain the discharge of a non-minority employee. This allocation of the burden of proof has been restated time and again by the authorities relied upon in the opinions below.

At pages 13-14 of his Petition, Petitioner gives an example which perfectly highlights the inadequacy of his own prima facie case in the District Court below. The Petitioner poses the example of an employer who "would seek to discharge outspoken blacks, but tolerate outspoken whites and quiet blacks." (Petition 14). Petitioner then argues that the hypothetical employer's "replacement of an outspoken black person with a quiet black person under these circumstances would, under the opinion below, be acceptable." (Petition 14). The fallacy of the Petitioner's example and argument lies in the fact that the Petitioner conveniently provides in his example a purported basis of disparate treatment between whites and blacks, *i.e.*, outspokenness. At trial, however, the Petitioner offered no evidence whatsoever suggesting any disparate treatment by Chrysler between minority and non-minority employees.

Though not articulated in his Petition, Petitioner pleaded before the Fifth Circuit that ". . .what matters is that this particular black person was treated adversely, in spite of his competence, and no legitimate reason for this adverse treatment was articulated at trial." (Petitioner's Fifth Circuit Brief 6). What Petitioner cannot seem to comprehend is that the issue under Title VII is not whether a minority employee has been fired or otherwise treated adversely, but whether that minority employee

has been fired or treated adversely *because* of his race, color, etc. In the case at bar, the Petitioner's discharge was never disputed. The sole issue was whether Petitioner's discharge had anything to do with his race. On the basis of the evidence offered by the Petitioner, *i.e.,* his race and the fact of his discharge notwithstanding the adequacy of his job performance (as distinguished from his on-the-job conduct), there was absolutely no basis for drawing any inference of discrimination. The Court may well ask why the Petitioner did not take the stand himself and at least articulate *his belief* that he had been fired because of his race. Such testimony would alone have been arguably sufficient to carry the Petitioner's initial burden of establishing a prima facie case. The Petitioner, however, chose not to testify and his counsel chose not to introduce any evidence whatsoever suggesting that the Petitioner had been treated any differently than non-minority employees at Chrysler's facility. Accordingly, the District Court quite rightly dismissed the Petitioner's case and the United States Court of Appeals for the Fifth Circuit properly affirmed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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